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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

FRANCISCO SOSA and
ANTONIO GARATE-BUSTAMANTE,
Petitioners,

v.

HUMBERTO ALVAREZ-MACHAIN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Francisco Sosa and Antonio Garate-Bustamante respectfully submit this reply brief in support of their petition for a writ of certiorari to review the order of the United States Court of Appeals for the Ninth Circuit dismissing their appeals for lack of jurisdiction.

I. WESTFALL ACT IMMUNITY PROVIDES IMMUNITY FROM SUIT, AND DOES NOT MERELY SHIFT LIABILITY

The Westfall Act immunizes federal employees from common law tort suits just as qualified immunity protects them from constitutional tort suits. To be effective, Westfall Act immunity must be protected by an immediate

right of appeal for the same reasons that qualified immunity warrants such protection.[1]

Respondent's argument that Westfall Act immunity "does not protect a defendant from suit but simply shifts liability to the government," Opp'n at 7-8, misstates the structure and operation of the Westfall Act. When a district court grants substitution to a federal employee under the Westfall Act, the individual defendant is dismissed from the suit, and the United States takes the employee's place as the party defendant. *See* App. to Pet. for Cert. 54a. The case then proceeds as a Federal Tort Claims Act suit, and becomes subject to the exhaustion of remedy and sovereign immunity defenses that are uniquely available to the United States. As a result, the individual no longer is a party to the case, and is insulated from further involvement in the litigation except, at most, as a witness. This protection from suit parallels that conferred by qualified immuniy, and should be treated similarly.

Respondent contends that Westfall Act immunity is not an immunity from suit because the employee may still be subject to some form of discovery and trial participation as a nonparty witness. This argument fails for several reasons, not the least of which is that this Court rejected such a restriction on immediate appeals last Term in *Behrens v. Pelletier*, 116 S. Ct. 834 (1996). In that case, the plaintiff argued that a qualified immunity-based immediate appeal should not be permitted when the defendant would face litigation on other claims regardless of the outcome of the appeal. This Court soundly rejected this argument, holding that the "right to immunity is a right to immunity *from certain claims*, not from litigation in general; when immunity with respect to those claims has been finally denied, appeal must be available, and cannot be foreclosed by the mere addition of other claims to the suit." *Id.* at 841.

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[1] Respondent counters this proposition by arguing that "[t]his Court has never so held." Opp'n at 7. The parallels between qualified immunity and Westfall Act immunity justify the grant of certiorari in this case to do exactly that.

The prospect that an individual might remain a *witness* in a lawsuit does not eliminate his right to appeal a decision forcing him to be a *defendant* in that suit. The Westfall Act is designed to immunize federal employees from the expense, risk, and exposure associated with defending a lawsuit, which is irrevocably lost if the individual is forced to proceed with discovery when, based on the Attorney General's certification and the allegations of the plaintiff's complaint, immediate substitution is appropriate. After substitution, the United States bears the burden of defending the case, and may very well win dismissal of the case entirely pursuant to its unique Federal Tort Claims Act defenses. Accordingly, both as a matter of law and of logic, petitioners' right to immediate review of the district court's substitution and qualified immunity rulings is unaffected by their status as potential witnesses in the continuing litigation against the United States.[2]

Respondent's argument that "an interlocutory appeal would not resolve any issue with finality," Opp'n at 13, is demonstrably wrong. The protections conferred by qualified immunity and Westfall Act immunity insulate defendants from the burdens of litigation, including discovery, as to those claims within their scope. Petitioners' position has been and continues to be that they are entitled to substitution and qualified immunity as a matter of law, based on the Attorney General's certification and respondent's own complaint. Were petitioners to prevail in their argument, the constitutional and common law claims would be dismissed. Under the principles of *Mitchell v. Forsyth*, 472 U.S. 511 (1985), and *Behrens*, the district court's ruling that petitioners must go forward

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[2] Respondent's position would similarly prohibit immediate appeals in § 1983 cases where a plaintiff sues an individual defendant and one or more government entities based on the same events. Because municipalities do not have qualified immunity, under respondent's theory no immediate appeal could be taken from a denial of qualified immunity to the individual because he likely would be a witness in the suit against the municipality. Such a result is clearly foreclosed by *Mitchell* and *Behrens*.

with discovery on those claims is a final decision for purposes of *Cohen*. Thus, contrary to respondent's suggestion, once petitioners' appeals are reinstated and resolved on their merits, the core claims in the case would indeed be resolved "with finality."

II. PETTTIONERS' QUALIFIED IMMUNITY APPEALS ARE NOT MOOT

The recent Ninth Circuit decision denying qualified immunity to different individual defendants in this case does not moot petitioners' appeals. Respondent's complaint charges those defendants—Berellez, Waters, Gruden, and Lawn—with unconstitutional conduct relating to the treatment of respondent after he reached the United States and was taken into custody by the DEA. The Ninth Circuit held that these allegations were sufficient to overcome the DEA defendants' qualified immunity defense at this stage of the case.

Petitioners' qualified immunity appeals are wholly separate from those resolved by the Ninth Circuit's ruling. Sosa, for example, is not alleged to have participated in any of the conduct that allegedly occurred when respondent was being questioned in El Paso, or at any other point during which respondent was held in custody in the United States. Petitioners argue in these appeals that respondent has not sufficiently alleged their personal participation in any unconstitutional conduct, and that nothing petitioners are alleged to have done violated respondent's clearly established rights. Petitioners' qualified immunity appeals are not moot.

III. RESPONDENT'S INTENTION TO SEEK LEAVE TO AMEND HIS COMPLAINT DOES NOT AFFECT APPELLATE JURISDICTION

Respondent's assumption that he will be given leave to amend his complaint does not deprive this Court of jurisdiction. As this Court explained just last Term, "*Mitchell* clearly establishes that an order rejecting the defense of

qualified immunity at *either* the dismissal stage *or* the summary-judgment stage is a 'final' judgment subject to immediate appeal." *Behrens*, 116 S. Ct. at 839. A plaintiff should not be permitted to manipulate appellate jurisdiction by opposing a motion to dismiss in the district court, and then declaring an intention to amend his complaint after the defendants have appealed the denial of that motion. Such a rule would run directly counter to *Mitchell* and *Behrens*, which recognize that an immediate appeal is necessary to guard against improper denials of immunity, regardless of the stage at which the immunity defense is raised.

In any event, respondent might not be permitted to amend his complaint. Because respondent has already amended his complaint once, he may amend it again only by leave of court. Fed. R. Civ. P. 15(a). "There is no absolute or automatic right to amend," *Williams v. Little Rock Municipal Water Works*, 21 F.3d 218, 224 (8th Cir. 1994), and depending on the resolution of petitioners' substitution and qualified immunity appeals, further amendment could be futile. The mere possibility that respondent will be permitted to amend his complaint has no effect on the jurisdiction of either this Court or the Ninth Circuit.

IV. THE CIRCUIT COURTS ARE DIVIDED ON THE QUESTION OF WHETHER A PRIVATE DEFENDANT WHO IS DENIED THE RIGHT TO RAISE A QUALIFIED IMMUNITY DEFENSE MAY TAKE AN IMMEDIATE APPEAL

Respondent recasts one of the issues presented by this petition as being whether a private defendant who is denied the right to raise a qualified immunity defense in a *Bivens* suit may take an immediate appeal from that ruling. In dismissing petitioners' appeals, the Ninth Circuit did not expressly adopt respondent's argument that petitioners had no right of immediate appeal because they were private parties. However, assuming that respondent

is correct that the Ninth Circuit dismissed petitioners' appeals because of their supposed private status, the circuit courts are deeply divided on that issue, providing an additional ground for granting certiorari.

Seven circuits have considered this issue in published opinions. Four permit immediate appeals by private individuals who have been denied the opportunity to raise an immunity defense. *See McKnight v. Rees*, 88 F.3d 417, 418 n.1 (6th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3315 (U.S. Aug. 26, 1996) (No. 96-318); *Mangold v. Analytic Servs., Inc.*, 77 F.3d 1442, 1446 & n.3, 1453 (4th Cir. 1996); *Burrell v. Board of Trustees of Ga. Military College*, 970 F.2d 785, 788 (11th Cir. 1992); *DeVargas v. Mason & Hangar-Silas Mason Co.*, 844 F.2d 714, 717 (10th Cir. 1988). Three circuits refuse to accept jurisdiction over such appeals. *See Felix de Santana v. Velez*, 956 F.2d 16, 19 (1st Cir. 1992);[3] *NF Indus., Inc. v. Export-Import Bank of the United States*, 846 F.2d 998, 1002 (5th Cir. 1988); *Chicago & North Western Transp. Co. v. Ulery*, 787 F.2d 1239, 1240-41 (8th Cir. 1986).[4]

In *Burrell*, the Eleventh Circuit recognized that an immediate appeal is essential to protect the potential immunity of a defendant who has been denied the opportunity even to raise a qualified immunity defense, just as it is for those whose qualified immunity defense has been considered and rejected. "If we have jurisdiction to determine whether a particular defendant generally eligible to raise qualified immunity may benefit from it in the particular case at hand, we surely have jurisdiction to determine

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[3] *See also Crippa v. Dukakis*, 905 F.2d 553, 556 (1st Cir. 1990); *Lovell v. One Bancorp*, 878 F.2d 10, 12 (1st Cir. 1989).

[4] The Ninth Circuit has held in an unpublished opinion that a defendant denied the right to assert a qualified immunity defense may not take an immediate appeal from that ruling. *See Penman v. Korper*, No. 91-15520, 1992 U.S. App. LEXIS 25810, at *3 (9th Cir. Oct. 8, 1992).

whether qualified immunity may shield that defendant as a general matter." *Burrell*, 970 F.2d at 788.

In contrast, the Eighth Circuit refuses to read *Mitchell* to permit an immediate appeal by a private defendant who has been denied the benefit of a qualified immunity defense. "[The *Mitchell*] rationale has no application in the instant case, where the defendants . . . are not public officials but private parties suable under 42 U.S.C. § 1983 only because they allegedly conspired with other persons acting under color of state law." *Ulery*, 787 F.2d at 1240-41.

Resolution of this conflict has taken on increased importance in light of the proliferation of governmental services being performed by private contractors. Those contractors are increasingly being sued in *Bivens* and § 1983 actions, and the circuits are split on whether and under what circumstances such parties are entitled to qualified immunity.[5] In light of this continuing uncertainty over the scope of qualified immunity protections, appellate jurisdiction over immediate appeals in such cases is essential, and cannot be left to turn on whether the defendant is sued in California or Florida. Regardless of whether qualified immunity ultimately protects defendants in these circumstances, the courts of appeals should have interlocutory jurisdiction under *Mitchell* to make that decision.[6]

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[5] *Compare McKnight*, 88 F.3d at 425 (denying qualified immunity to correctional officers employed by private corporation under contract with state) *with Williams v. O'Leary*, 55 F.3d 320, 323-24 (7th Cir.) (extending qualified immunity to doctor employed by private corporation under contract with state to provide medical services at state correctional facilities), *cert. denied*, 116 S. Ct. 527 (1995).

[6] Respondent's reliance on *Rambo v. Daley*, 68 F.3d 203 (7th Cir. 1995), *cert. denied*, 116 S. Ct. 1546 (1996), is sorely misplaced. In that case, it was the *defendants* who argued vigorously that they were acting strictly as nongovernmental private parties during the events in question, and therefore could not have acted under color of law for purposes of § 1983 liability. The Seventh Circuit quite understandably ruled that, in such a situation, qualified immunity

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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is not available as a defense, and so an immediate appeal is not permitted. *Rambo* has no relevance to situations where, as here, the defendants contend that they were performing governmental functions at the behest of public actors.

In addition, respondent inaccurately suggests that *Rambo* is the only post-*Johnson* appellate court decision to consider the appealability of a district court's refusal to permit a private party to raise a qualified immunity defense. *See* Opp'n at 10. In fact, *McKnight* specifically held that *Johnson* did not affect its jurisdiction to hear the appeal of privately employed correctional officers who had been denied the right to rely on a qualified immunity defense. *See* 88 F.3d at 418 n.1.